SUPREME COURT OF YUKON

Citation: *Harvey* v. *5505 Yukon Ltd. et al*.,
2012 YKSC 98

Date: 20121206
S.C. No. 08-A0004
Registry: Whitehorse

Between:

SHARMAN HARVEY, Administrator of the Estate of ROBERT RICHARD HARVEY, Deceased

Plaintiff

And

5505 YUKON LIMITED, ROY A. SLADE, and CHRISTINE DOKE

Defendants

Before: Mr. Justice D.R. O'Connor

Appearances:

James D. Vilvang, Q.C. — Counsel for the Plaintiff
P. Daryl Wilson, Q.C. — Counsel for the Defendants

ENDORSEMENT RE COSTS

[1] Both parties claimed costs of the second trial.

[2] I conclude that there were no Offers to Settle at the time of the second trial that should play a role in my decision. The defendants argue that I should consider their offer of August 15, 2008. I decline to do so. That offer was overtaken by a subsequent, better offer on July 23, 2009. The second offer was withdrawn before the first trial. The defendants never reasserted the August 15, 2008 offer, nor did they indicate to the

plaintiff that they were relying upon it. I am satisfied that the plaintiff reasonably considered that the August 15, 2008 offer was no longer on the table.

[3] Further, I am not prepared to consider the "without prejudice" discussions between counsel preceding the second trial. Those discussions were never reduced to a formal offer. I do not know the content of those discussions. They play no role in my decision.

[4] The purpose of the second trial was to determine the fair market value of the shares of 5505 Yukon Limited. There are two ways to approach the question of who was successful on that trial. The plaintiff argues that because there was no offer from the defendants, she was required to go to trial to obtain the judgment that she has now obtained based on my valuation of the shares at $750,000. She points out that the defendants' experts valued the shares in an amount less than that awarded. Viewed in this manner, the plaintiff was successful.

[5] On the other hand, the defendants argue that the second trial was, in effect, a battle of duelling experts. The plaintiff's expert valued the shares in a range of $1 million to $1.5 million with a mid-point of $1.2 million. The defendants' expert valued the shares, applying a minority discount of 10 percent, in the approximate range of $610,000 to $690,000 with a mid-point of about $650,000.

[6] I accepted all of the evidence of the defendants' expert with the exception that I did not apply a minority discount. Thus, absent the minority discount issue, I concluded that the defendants' expert's evidence incorporated the proper valuation approaches and arrived at an appropriate range for the value of the shares. I did not accept the

evidence of the plaintiff's expert. Thus, viewed through the lens of whose evidence was accepted at the second trial, the defendants were almost entirely successful.

[7] Looked at narrowly, the plaintiff was successful in that it was necessary for her to proceed with the trial to recover the amount awarded. The usual rule is that costs follow the event. However, the reality of the second trial was that it involved a dispute between the parties' experts about the valuation of the shares and the defendants were almost completely successful in the result. In my view, that success militates against applying the usual rule with respect to costs. I am satisfied that the ends of justice would be best served by making no order as to costs and I so direct.

"D. O'Connor"
O'Connor J.